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FILED
JUN 4 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

REPLY BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The "Statement of the Case" in Respondent's Brief is no more than a superficial and slanted statement of a very few of the facts of this case intended to mislead this Court as to the nature of what is before it. Respondent compresses all of the activities of Petitioner's lifetime into a few sentences in an attempt to indicate that Petitioner was a figure who was constantly in the public view. A reading of the record in this case indicates that this is not true.

Respondent refers to various books written by Petitioner and to certain positions he has held as a concerned citizen. Respondent deliberately attempts to mislead the Court into believing that these activities were contemporaneous with the defamatory publication. In fact, they were of ancient and forgotten vintage. For example, one of the books referred to was published forty years before the libelous publication and had a very modest circulation then and not at all since then; the other books were published several years prior to the Stang article; none had a large circulation. The organizations Petitioner had headed and the citizens committees on which he served went back to periods ranging from a few years to decades prior to the publication.

What is worse, Respondent gives the impression that Petitioner was a delegate to the Illinois Constitutional Convention at the time of the publication, despite being advised that it was afterwards and that Petitioner had not even contemplated running until after suit was filed. This is characteristic obfuscation of the facts and issues. It is upon such confusion that Respondent depends. Petitioner may not have been a mine-run person, but that does not make him a public figure in the constitutional sense. He is entitled to the protection of recognized laws applicable to all private persons, particularly when to treat him otherwise would adversely affect the rights of his clients.

As was testified by Petitioner, with no contradiction, he had been involved in no public activities for a considerable period of time prior to the publication of the article in question. He had been involved in no activities relating in any way to the alleged harassment of the police.

More will be said regarding this in reply to the various arguments raised by Respondent. Suffice it to point out at this juncture that the architect of the article in question, Respondent's Managing Editor, Stanley, testified at trial that prior to the publication of the article he had not known Petitioner, whose name had been mentioned to him only in passing by the author, Stang, in a telephone conversation. This admission destroys any contention that Petitioner was so well known that the very mention of his name would excite the interest of the public or of a publisher. Certainly at the time that it published the article, Respondent could not have discussed someone unknown to it in the vein that he was a public figure.

Respondent's version of the questions presented in this cause are a complete distortion of this matter. The central issue is whether Petitioner, for whatever reason, should be required to prove actual malice on the part of Respondent in order to recover an award of damages for libel. Petitioner contends, of course, that such a ruling in this case will destroy the law of libel and leave all private citizens at the mercy of unscrupulous publishers, and will not further the public's right to the free flow of information as guaranteed by the First Amendment.

If, however, it is determined that Petitioner is required to prove actual malice, the issue then becomes whether he was given an opportunity to prove actual malice as first defined in *New York Times*. The record shows, without doubt, that Petitioner was not given such an opportunity, and at the very least, he should be awarded a new trial in order to meet that standard of proof. More, malice may have been established here as a matter of law.

Respondent's contention that Petitioner is a public official is without adequate foundation. It is undisputed that at the time of the article, and for a considerable period of time previous thereto, he had had no connection with government or governmental agencies; nor was it stated in the article that he had any such connections at the time of the incident being discussed, nor was the article written in the light of any such contention.

Petitioner's appearance at the inquest into the death of Ronald Nelson did not transform him into a public official. He participated, in a limited way, as a private attorney on behalf of private clients, the parents of the slain youth. The fact that this proceeding was held pursuant to State statute, as are all judicial proceedings in the State of Illinois, whether civil or criminal, has absolutely no bearing upon the matter. He was only one of many persons who participated. He held no official capacity whatsoever. Only the staffs of the Coroner and State's Attorney had official connection with the matter. Furthermore, this inquest did not lead to the indictment of Officer Nuccio. The Coroner's Jury returned an "open" finding—indicating that they could reach no conclusion whatsoever. Such a finding shows that Respondent's argument that Petitioner's participation "significantly influenced the resolution of issues of public Interest" is entirely without foundation. The eventual indictment of Officer Nuccio was returned by the Grand Jury, with absolutely no impetus from Petitioner whatsoever. Nor did Petitioner have anything to do with the trial or conviction of Nuccio.

There is no foundation for the conclusion that Petitioner is a public figure. He made no public statements concerning the Nuccio matter. He was never quoted or

discussed in any newspaper article regarding the criminal proceedings involving Nuccio. He took part in none of the Nuccio criminal proceedings. Significantly, Respondent's article made no attempt to show that Petitioner was actually involved in those criminal proceedings. As has been pointed out time and time again, Petitioner acted inconspicuously, in a purely private capacity, representing private clients. Aside from Petitioner's limited participation in the inquest, Respondent's article made no reference to any actions by Petitioner, other than the fact that he had filed civil suits on behalf of his clients.

Petitioner took no action which could be construed as having thrust himself into the vortex of any public controversy. In fact, there was no public controversy. Any controversy was the complete invention of Respondent, and its false theses regarding a Communist conspiracy to frame an allegedly innocent police officer. A more accurate description of the situation would be to say that Petitioner was dragged unwillingly into a false vortex wholly of Respondent's making. This cannot be sufficient to transform Petitioner into a public figure, otherwise every defamer can create his own escape hatch and all wronged persons are powerless to ask for redress.

In any event, Petitioner was not spoken of in a public capacity in the article. None of his public actions or activities were discussed. Nothing was said about what he had done publicly in connection with Nuccio. None of his questions at the inquest were quoted. Virtually every statement concerning Petitioner had something to do with organizations to which he had allegedly belonged years earlier. What does this have to do with the public's right to know about the prosecution of Officer Nuccio?

Absolutely nothing. Petitioner had nothing to do with that prosecution. Any mention of him in connection with it was wholly the figment of Respondent's imagination, or of that of its staff author, and, therefore, malicious.

Nor was Petitioner so well known as to have become a public figure by virtue of his very existence. Respondent's argument in support of this thesis is without force. Petitioner's alleged association with the organizations mentioned in Respondent's brief (p. 9) was untrue in virtually every instance or had ceased years before the article was published, and none of the few organizations to which Petitioner belonged was communistic. His connection with the Illinois Constitutional Convention occurred after the article was published. Furthermore, none of these alleged public activities was mentioned in the article in connection with Nuccio. While placing the utmost importance upon them now, Respondent did not think them important enough to note in its article, contenting itself with stating: "In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild . . ." (Article, p. 6) Petitioner had not been a member of this organization for over fifteen years, and when he belonged to it the organization numbered among its other members and supporters, persons who were, or became, high public officials, including justices of this Court.

Finally, Respondent's managing editor had never heard of Petitioner until he saw the article. None of the prospective jurors in this case—residents of Petitioner's own town wherein it is alleged he had the most influential status—had ever heard of Petitioner. This is the very antithesis of a public figure.

Surprisingly, Respondent devotes almost no discussion to that issue which is the most critical in this case—whether Petitioner's involvement, however slight, with a matter which is arguably the subject of public interest, is sufficient to require him to prove knowing falsity or reckless disregard on the part of Respondent. It was upon this basis that the Court of Appeals held that Petitioner was required to prove malice in the Constitutional sense. Respondent is content to cite *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 91 S.Ct. 1811 (1971), as having settled this issue. However, only three of the Justices of this Court agreed upon the approach that the rule of the *New York Times* be extended to any matters involving public or general concern. A failure of the majority of the Justices of this Court to adhere to that proposition, "prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." *Hertz* v. *Woodman,* 218 U.S. 205 (1909). See also *United States* v. *Pink,* 315 U.S. 203 (1941); *Dorr* v. *United States,* 195 U.S. 138, (Concurring Opinion of Justice Peckham).

The failure of a majority of the Justices of this Court to agree upon a single approach to this problem highlights its difficulty. Petitioner has attempted to set forth a rational discussion of that problem in his main brief. An accommodation must be made between the strongly competing policy interests which vie for attention in this area. Petitioner has suggested such an accommodation. Respondent has not seen fit to reply to that argument, being content to state bare conclusions. We respectfully refer this Court to pages 16ff of our brief.

Contrary to Respondent's contention (Respondent's Brief, p. 12), Petitioner was indeed on the far edge of

the controversy over the criminal trial of Officer Nuccio. That article dealt essentially with the criminal prosecution of Officer Nuccio. The false innuendos and snide comments contained in that article to the contrary, Petitioner had absolutely nothing to do with that criminal proceeding. He was not a legitimate party to a discussion of it, and should not be held to the criteria as set forth in *New York Times*. There was some little publicity about the Nuccio case, none of it involving Petitioner. This was no *cause celebre,* just another case in which an individual policeman used more force than permitted by law.

Both the District Court and the Court of Appeals held that Petitioner had not sufficiently proved actual malice on the part of Respondent. What they overlooked is the undisputed fact that at no time was Petitioner required or given an opportunity, to do so. He was informed throughout pre-trial discovery, and at trial, that this case would proceed along traditional lines of libel, and that the *New York Times* standard was not to be applied. Then, after the trial was concluded, it was held, retroactively, that Petitioner failed to prove malice. Respondent now castigates Petitioner for not making an offer to prove such actual malice. (Respondent's Brief, p. 17) What would be the occasion for making such an offer? Must one present unnecessary evidence when he has been informed that he need not do so?

Without even attempting to do so, however, Petitioner did in fact introduce evidence which is sufficient to indicate actual malice on the part of Respondent, as a matter of law under the appropriate rules, as discussed in Petitioner's main brief (pp. 39ff). Stanley, Respondent's managing editor, personally vouched for information which he had no reason to believe was true. Absolutely

no attempt was made to verify any of the information, and the article was rushed into print (in a monthly magazine) in the extraordinarily short time of 24 hours. This is the height of irresponsibility. Indeed, it was Stanley, in light of his preconceived policy line of finding a Communist in every nook and cranny, who dispatched the author with instructions as to the kind of story he was to write—a story which was preconceived and concocted before one fact had been investigated. If the story had not agreed with this pre-conceived Communist-plot thesis, it would not have been printed at all. It was not that Stang had a reputation for accuracy, but that he echoed Stanley's Birchite viewpoint, which is completely contemptuous of the facts. "American Opinion" knowingly published fiction which it labeled as fact.

Even after Respondent was put on notice of the falsity of the article by service upon it of the Complaint in this matter, it continued to distribute the defamatory story, both in magazine and reprint form, for almost a year. This is clearly malice as a matter of law. What more malice could be required? Such a series of events, despite Respondent's protests of having a mind as blank as a *tabula rosa,* is the height of irresponsibility, and cannot be countenanced in a free society. This evidence establishes malice under the rules set down in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967).

At the very least, even if there is not malice as a matter of law, Petitioner must be given an opportunity to retry this cause at which retrial he can develop more fully the relationship between Respondent and Stang, the alleged free-lance author who is in reality an integral and managerial part of Respondent's organization. Such a connection, which was fraudulently concealed from

Petitioner and the Court below, will be sufficient to attribute his malice to Respondent, and thus make it answerable for his outrageous actions. Petitioner was informed that such information would be unnecessary at the trial of this case. Now that the rules of the game have been changed *ex post facto,* due process requires that Petitioner be given an opportunity to carry any burden under those rules.

Contrary to Respondent's contention, Petitioner does not seek that attorneys be given a special privilege. Rather, Petitioner contends that attorneys and their clients must not be penalized because they have undertaken to shoulder a public trust. When they are defamed, they must have a reasonable opportunity to set the record straight. When an attorney is involved in a trial, and the proceedings leading up to it, he is bound by the canons of ethics not to try his case in the newspapers. Now, Respondents would deny him recompense through the Courts as well. He must have some reasonable access to some forum wherein he may be vindicated. That is all Petitioner asks.

Moreover, it is grossly unfair for a court which has discretion in taxing costs to charge Petitioner in a situation in which he is admittedly blameless. At the very least, there should be no taxing of such costs, and certainly not in the amount involved herein.

CONCLUSION.

Contrary to Respondent's off-hand dismissal of this case, it does indeed present important issues which should be thoroughly explored by this Court. No similar situation has been considered by this Court in connection with the status of libel in light of the First Amendment.

The proceedings in this case have turned out to be somewhat bizarre. The case was tried on the express instructions that it was a traditional libel case, and that the language complained of was libelous *per se*. Thus, Petitioner was required to prove neither actual damages nor malice. After the jury had awarded him a verdict, the District Court held that he was in actuality a public figure, that he should have proved malice and that his purported failure to do so was fatal to his case. Having changed the applicable rules *ex post facto*, it would have been appropriate to grant a new trial in order that Petitioner could meet this newly created burden of proof. Yet, the District Court and the Court of Appeals denied Petitioner this obvious remedy. And, to add injury to insult as it were, the Court of Appeals ordered Petitioner to pay all of the very substantial costs of the case (over $2,000). A clearer denial of due process could hardly be imagined. (See pp. 48ff of original brief)

As demonstrated by Petitioner in his main brief, this case illustrates a collision of the fundamental constitutional rights of privacy and freedom of speech. Each of these rights is entitled to protection. Neither one is paramount to the other. In a society as complex as ours, the individual is in danger of being submerged. The rights

of the individual must not be suppressed at the expense of the "greater good." This is particularly true where an accommodation can be made which grants the individual and the public sufficient protection of their legitimate interests. Requiring one libelled to prove the falsity of the accusations and, after such a showing, requiring the publisher to prove his probably cause to believe the truth of his statements, grants sufficient protection to all in terms readily understood by the courts and the public. Neither side is saddled with an unconscionable burden. Both are thereby required to conform their conduct to acceptable standards. Such an approach will preserve that free, open and robust debate which is vital to the existence of our free society while at the same time granting the individual a reasonable opportunity to obtain vindication for unsupportable harms done to him.

There is nothing in *New York Times* v. *Sullivan*, and its progeny which permits deliberate lying and distortion. Respondent has the effrontery to declare in its brief that it did not call Petitioner a Communist. Does it think that the justices of this Court cannot read?

For the foregoing reasons, the judgment of the Court of Appeals, affirming the judgment of the District Court, must be reversed and the verdict in petitioner's favor reinstated. Alternatively, the judgments below must be reversed with directions to order a new trial in conformity with the standards specified by this Court. In any events, no costs should be taxed against Petitioner.

Respectfully submitted,

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